

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

The trial court dismissed the case without prejudice and the State failed to refile the charge within 60 days of the dismissal.

The State of Arizona, by and through undersigned counsel, in response to the defendant's Motion to Dismiss With Prejudice, requests this Court to deny the motion for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The State does not dispute the facts as presented by the defendant. The defendant alleges that the State failed to refile the instant case within 60 days of the mandate dismissing the case without prejudice, and cited Rule 8.2(d), Ariz. R. Crim. P., which states:

d. NEW TRIAL. A trial ordered after a mistrial, upon a motion for a new trial, or upon the reversal of a judgment by an Appellate Court shall commence within 60 days of the entry of the order of the court or service of the mandate of the Appellate Court.

The defendant emphasized that the pertinent part was that the new trial "shall commence within 60 days" of "reversal of a judgment." The State contends that in the instant case, the Court's mandate was not a "judgment" as that term is defined in Rule 26.1(a), Ariz. R. Crim. P.:

a. Judgment. The term judgment means the adjudication of the court based upon the verdict of the jury, upon the plea of the defendant, or upon its own finding following a non-jury trial, that the defendant is guilty or not guilty.

In *State v. Bruggeman*, 154 Ariz. 489, 744 P.2d 16 (1987), the Court dealt with a factual scenario far different from the one presently before this Court. In *Bruggeman*, the appellate court had reinstated an indictment that had previously been dismissed

without prejudice. In the instant case we are not dealing with the reinstatement of a previously existing indictment, but with the dismissal of a case. Furthermore, the Court in *Bruggeman* relied on in *Hinson v. Coulter*, 150 Ariz. 306, 723 Pd 655 (1986), which has since been overruled by *State v. Mendoza*, 170 Ariz. 184, 823 P.2d 51 (1992).

The defendant also notes that in *Bruggeman*, the Court cited *State ex rel. Berger v. Superior Court*, 111 Ariz. 335, 529 P.2d 686 (1975). From this, he contends that if there is a dismissal without prejudice, retrial must occur within sixty days. The *Berger* Court did not hold that if the matter was dismissed without prejudice retrial must occur within sixty days. Rather, the Court simply noted that if the matter was to be dismissed without prejudice, the defendant would be given the opportunity to withdraw from a previously entered plea agreement, in which case retrial must occur within sixty days. In the instant case there has never been a plea agreement or any other action that could be considered a judgment.

In this case, no trial has been ordered after a mistrial or a motion for new trial, and no judgment, as that term is defined by Rule 26.1(a), Ariz. R. Crim. P., has occurred, Rule 8.2 (d), Ariz. R. Crim. P., is inapplicable. Therefore, the State requests this Court to deny the Defendant's Motion to Dismiss with Prejudice.